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No. 49

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1930

BAIN PEANUT COMPANY OF TEXAS, ET AL.,
Appellants

vs.

DAVE PINSON AND C. B. GUYGER,
Appellees

APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

APPELLANTS' MOTION TO STAY MANDATE

B. L. AGERTON,
Counsel for Appellants.

BRYAN, STONE, WADE & AGERTON,
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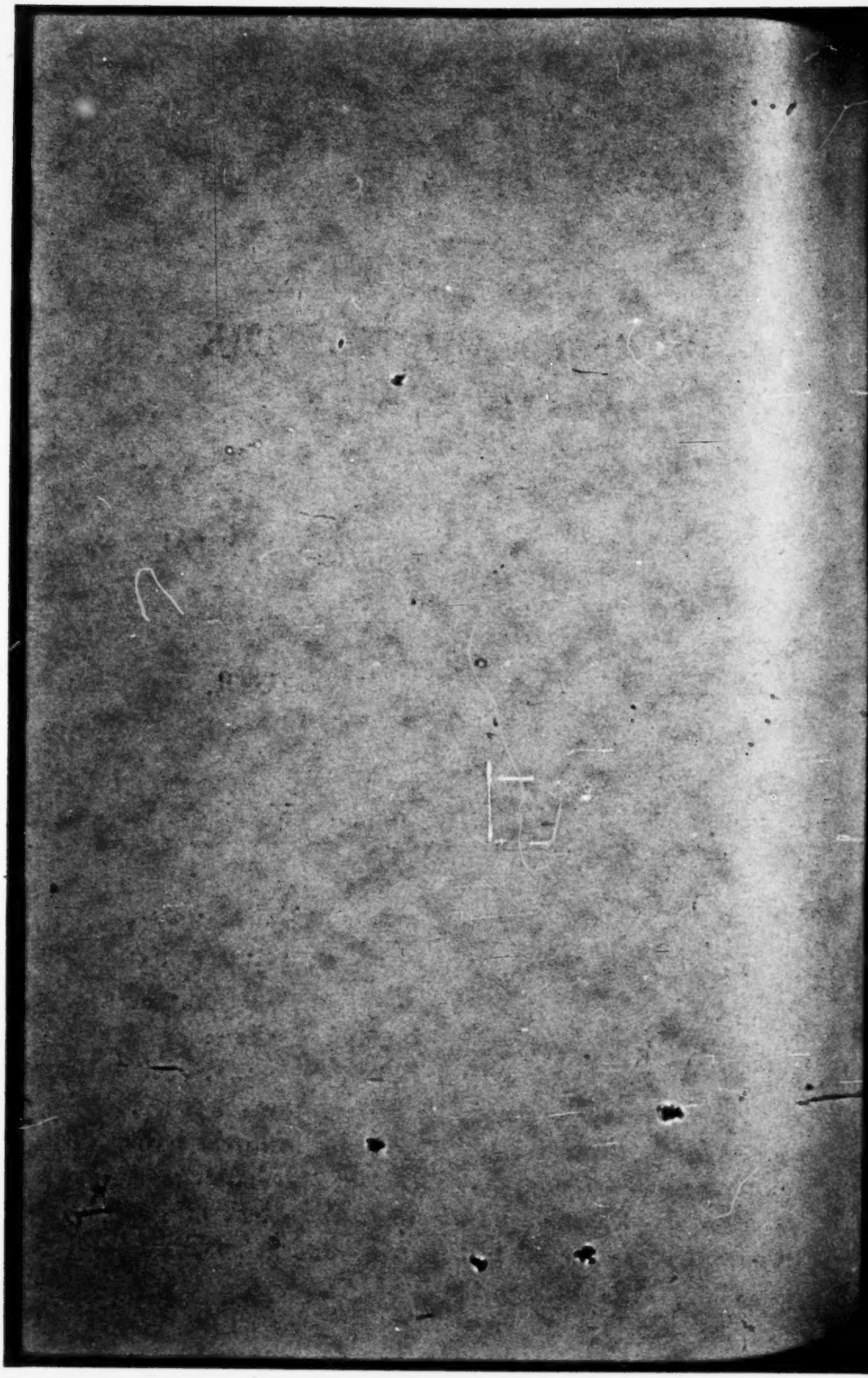

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To The Honorable Supreme Court of the United States:

On January 19th the Court dismissed the appeal herein. So far as appellants can ascertain from the authorities cited in the order of dismissal, the effect of that order was to sustain appellees' motion to dismiss, and appellants verily believe that the reasons urged by appellees for dismissing the appeal did form the basis of the Court's action in that respect. Immediately upon receipt of telegraphic advice from the Clerk of this Court that the appeal had been dismissed, appellants

prepared a motion addressed to the Supreme Court of Texas asking that Court to enter an order declaring the legal significance, in unambiguous language, of the order of that Court entered on December 11, 1929, by which it in terms dismissed "for want of jurisdiction" Bain Peanut Company of Texas' application to the Supreme Court of Texas for a writ of error to review the judgment of the Court of Civil Appeals here appealed from. At the earliest opportunity thereafter, namely, on January 23, 1931, said motion was presented in chambers to the Chief Justice and Associate Justices of the Supreme Court of Texas, and was by them ordered filed and set down for hearing Thursday, January 29, 1931. Notice of the motion was immediately served upon attorneys for appellees, Pinson and Guyger, who filed their answer thereto; and on January 29, 1931, the Supreme Court of Texas in terms overruled but in effect granted said motion and entered an order by which it found and declared that in dismissing Bain Peanut Company of Texas' application for writ of error on December 11, 1929, as "for want of jurisdiction" it did not find or intend to find or declare a want of actual jurisdiction to review the case; but, on the contrary, said petition for writ of error was presented to it in due time and that the Court simply refused to grant the petition in the exercise of its discretion and declined to review the case because the members of that Court were of the opinion that the Court of Civil Appeals had correctly disposed of the case; and, further, that the form of order so entered by the Supreme Court was controlled, in their view of the record and of the disposition made

by the Court of Civil Appeals of the case, by that portion of Article 1728, Revised Civil Statutes of Texas, which provides in effect that when the Supreme Court of Texas is asked to review the judgment of a Court of Civil Appeals by application for writ of error it shall, if it approves the disposition made by the Court of Civil Appeals of the case but does not necessarily approve of all of the principles of law declared by the Court in so doing, dismiss the application for want of jurisdiction.

A copy of that order is printed as an Appendix hereto; and appellants pray that the Court consider same, as was done in practically the identical situation, in the case of *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095. A certified copy of said order and of the motion upon which it was entered have been filed with the Clerk.

Appellants are preparing and will, without delay, and within the time permitted by the rules, file a formal petition for rehearing herein. Their failure to do so heretofore has resulted from no intention to delay, but solely from the fact that they have been compelled to wait upon the Supreme Court of Texas to enter the order hereto attached as a basis for said petition. (In this connection these appellants say that immediately after appellees filed their motion to dismiss the appeal, they presented to the Supreme Court of Texas a request for some such order as it has now entered clarifying their said order of December 11, 1929, herein referred to, but that Court, for reasons then thought by it to be sufficient, refused to grant such request.)

Appellants believe that said order by the Supreme Court of Texas should be considered and that its consideration will lead to a reversal of the Court's decision to dismiss the case, and to a reinstatement of the appeal. They, therefore, respectfully and earnestly pray the Court to enter an order directing the Clerk to withhold issuance of mandate herein until the Court shall have finally disposed of appellants' said petition for rehearing.

Respectfully submitted,

B. L. Eggleston

J. J. Mansell

Counsel for Appellants.

CERTIFICATE

We, the undersigned, counsel for appellants in the above entitled and numbered cause, hereby each certify that the foregoing motion for stay of mandate is presented in good faith and not for delay.

WITNESS OUR HANDS at Fort Worth, Texas, this 30th day of January, 1931.

B. L. Eggleston

J. J. Mansell

Counsel for Appellants.

APPENDIX

Mo. No. 9436

BAIN PEANUT COMPANY OF TEXAS
Plaintiff in Error

vs.

PINSON AND GUYGER
Defendants in Error

Plaintiff in Error has filed a motion for an order nunc pro tunc correcting the order heretofore entered by this Court dismissing its application for a writ of error.

It is true, as contended by plaintiff in error, that its failure to file an application for writ of error within thirty days from July 12, 1929, on which date the Court of Civil Appeals vacated its initial judgment and entered a more onerous judgment against plaintiff in error, was not regarded as defeating the jurisdiction of the Supreme Court to revise by writ of error such more onerous judgment. In our opinion, the Court of Civil Appeals clearly acted within the scope of its lawful authority on July 12, 1929, when, on motion seasonably filed, it vacated its initial judgment. There then remained subject to review or enforcement only the judgment of July 12, 1929. Whatever errors were to be corrected were those arising from that judgment on the rehearing in the Court of Civil Appeals. The rule is

established in Texas that a party's petition for writ of error to the Supreme Court must be filed within thirty days from the date on which his motion for rehearing was overruled in the Court of Civil Appeals. *Schleicher* v. *Runge*, 90 Tex. 456; *Vinson* v. *Carter & Brother*, 106 Tex. 274; *Henningsmeyer* v. *Bank*, 109 Tex. 117. Nevertheless, each time the Court of Civil Appeals, on motion or motions duly filed, validly vacates its previous judgment or judgments and substitutes therefor a different valid judgment against a party, he is thereby entitled to seek correction, through rehearing, of such different judgment, and it is not compulsory that he invoke the jurisdiction of the Supreme Court earlier than within thirty days from the overruling of his last motion for rehearing. Our statutes contemplate that a case should be reviewed by the Supreme Court at the instance of one party not piecemeal but as an entirety. Hence, it is only when the jurisdiction of the Court of Civil Appeals has terminated by overruling a party's permissible motion or motions for rehearing and thus leaving its judgment in the form it directs that it be finally enforced against him, that the period of thirty days for him to invoke the jurisdiction of the Supreme Court under writ of error begins finally to run.

In the above cited case of Henningsmeyer v. Bank, the Court called attention to the fact that it did not question the authority of the Court of Civil Appeals to set aside a former order and enter an entirely different order, but the ruling was that no effect would be given to such action when taken for no other purposes than

to permit an application for writ of error to be filed after lapse of the statutory time.

Regarding the last judgment as that complained of, since the first was already vacated, the Court considered plaintiff in error's application as presented in due time under its practice stated in 3 *Texas Jurisprudence*, section 175, as follows:

> "When the order complained of is not made until the rehearing in the Court of Civil Appeals it is necessary for the complaining party to make a further motion for rehearing if he would in the Supreme Court urge as erroneous the order complained of; for, in the light of the rules of the Supreme Court, the motion for rehearing, to form the basis for a consideration in the Supreme Court, must be predicated upon the judgment or order of the Court of Civil Appeals actually deciding the matters complained of."

While regarding the application for writ of error as filed within the proper and statutory time, we intended and did dismiss the application for want of jurisdiction under Article 1728 as amended by Acts 1927, 40th Legislature, page 214; Article 1728, Complete Texas Statutes of 1928, having concluded that while the case otherwise came within the potential jurisdiction of the Supreme Court, it was a case where the judgment of the Court of Civil Appeals was a correct one, but we were not satisfied that the opinion of the Court of Civil Appeals had in all respects correctly declared the law. For that reason, it was the Court's duty, under the statute, to refuse to take jurisdiction and to dismiss the case for want of jurisdiction.

Because the order entered on the minutes correctly reflects the action of the Court, the motion of plaintiff in error is overruled.

THOMAS B. GREENWOOD,
Associate Justice.

Opinion delivered January 29, 1931.

I, F. T. Connerly, Clerk of the Supreme Court of the State of Texas, do hereby certify that the above and foregoing two pages contain a true and correct copy of the original opinion of the Supreme Court of Texas on Motion to Correct Judgment Entry in the case of Bain Peanut Company of Texas, Plaintiff in Error vs. Pinson & Guyger, Defendant in Error, Mo. No. 9436, (App. No. 17123), from Comanche County, Eleventh District, said original opinion having been delivered by the Supreme Court of Texas on January 29th, 1931, and now being on file in this office.

IN TESTIMONY WHEREOF, Witness my hand and the seal of the Supreme Court of the State of Texas, at the City of Austin, this the 29th day of January, A. D. 1931.

(SEAL) F. T. CONNERLY,
Clerk of the Supreme Court of Texas.